No. 78-1372

Supreme Court, U. S.
FILED
MAY 21 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

EDWARD ARAMBASICH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES

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ARGUMENT

The Government's brief illustrates a callous indifferent attitude to the prejudice created by multiple prosecutors (G.Br. 7). *The brief infers a defendant is not prejudiced by having to defend five separate cases rather than one consolidated case.* This attitude of the Government is contrary to a long line of cases decided by this Court and cited by Petitioner in his brief. *Brown* v. *Ohio,* 432 U.S. 161, 53 L.Ed.2d 187 (1977); *Jeffers* v. *United States,* 432 U.S. 137,

53 L.Ed.2d 168 (1977); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 51 L.Ed.2d 642 (1977); *Ashe* v. *Swenson*, 397 U.S. 436, 25 L.Ed.2d 469 (1970); *Green* v. *United States*, 355 U.S. 184, 2 L.Ed.2d 199 (1957); *In Re Nielsen*, 131 U.S. 176, 9 L.Ed.2d 672 (1889). This court's concern about multiple prosecutions was best stated in *Green* v. *United States*, 355 U.S. 184, 2 L.Ed.2d 199 (1957). The Court stated multiple prosecutions subject a defendant to embarrassment, expense and ordeal

> *"as well as enhancing the possibility that even though he may be innocent he may be found guilty"* (emphasis added) *Green* v. *United States*, 355 U.S. 184, ... (1957)

Justice Harlan again stated the Court's concern in *United States* v. *Jorn*, 400 U.S. 470, 479, 27 L.Ed.2d 543 (1971):

> "[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws." *United States* v. *Jorn*, 400 U.S. 470, 479, 27 L.Ed.2d 543 (1971)

Mr. Justice Brennan made the same observation in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569, 516 L.Ed.2d 642, 644 (1977).

This Court has always recognized that multiple charges increase the Government's chances for conviction as well as recognizing the impossibility of defending one indictment after another. *Ashe* v. *Swenson*, 397 U.S. 436, 25 L.Ed.2d 469 (1970). This defendant asked the District Court for no more than this Court granted the defendant in *Ashe* v. *Swenson*, namely, a single trial to determine his guilt or innocence. The consolidation of his cases would not have required duplication of proof or inconvenience of witnesses. There

would have been the same number of trials and the witnesses would have appeared the same number of times and given the same testimony. The difference, and only difference, would be the defendant would be tried on all the charges at once. Thus, the Government would not have had five (5) opportunities to convict him.

The Government brief attempts to minimize the effect of the prejudice by pointing to the fact "the last four trials were conducted on the basis of stipulated evidence"[1] and, thus, what may have been prejudice becomes inconvenience. (Government's brief p. 7) This is ridiculous. The "inconvenience" of which the Government speaks is the onerous burden of defending five indictments and convincing five juries of his innocence. The stipulations merely reflect the defendant's recognition of the impossibility of accomplishing that goal regardless of his innocence and the expense of trying. The stipulations were an effort to preserve his rights regarding consolidation, yet, reflect the futility and expense of having to defend them. The stipulations were not bargains made by equals, but rather practical accommodation with reality. The defendant's strategy was dictated by the fact he had to defend and win five cases. The only case where there was a trial, he stands *not guilty*. The reality and cruelness of prejudice is only now fully evident. The conviction in 76 CR 598 has been remanded for a new trial and the Government has stated that that case will be dismissed when these convictions are affirmed. Thus, his conviction and imprisonment will be the direct result of the impossible burden of defending five separate indictments. Nothing could be more unfair. *Rinaldi* v. *United*

[1] The fact is that the defendant stipulated to the Government's version of the witnesses' testimony, a strategy dictated by the same concerns this court disapproved of in *Ashe* v. *Swenson* and other cases.

States, 434 U.S. 22, 54 L.Ed.2d 207 (1977); *Ashe* v. *Swenson,* 392 U.S. 436, 25 L.Ed.2d 469 (1970).

Multiple prosecutions can hardly be characterized as an "inconvenience". As noted, this Court has continually found them to be offensive to the constitution. *Ashe* v. *Swenson,* 397 U.S. 436, 90 S.Ct. 1189 (1970). In fact, the position of the Government in this case is inconsistent with its position in numerous other cases. See *Petite* v. *United States,* 361 U.S. 529 (1960). *Frakes* v. *United States,* 435 U.S. 911 (1978) (mem.) (vacating *United States* v. *Frakes,* 563 F.2d 803 (6th Cir. 1977) (per curiam); *Rinaldi* v. *United States,* 98 S.Ct. 81, 86 (1977) (per curiam) (vacating *In re Washington,* 544 F.2d 203 (5th Cir. 1976) (en banc); *Croucher* v. *United States,* 429 U.S. 1034, 1034 (1977) (mem.) (vacating *United States* v. *Houltin,* 525 F.2d 943 (5th Cir. 1976); *Watts* v. *United States,* 422 U.S. 1032, 1032 (1975) (mem.) (vacating *United States* v. *Watts,* 505 F.2d 951 (5th Cir. 1974) (per curiam); *Ackerson* v. *United States,* 419 U.S. 1099, 1099 (1975) (mem.) (vacating *United States* v. *Ackerson,* 502 F.2d 300 (8th Cir. 1974); *Hayles* v. *United States,* 419 U.S. 892, 892 (1974) (mem.) (vacating *United States* v. *Hayles,* 492 F.2d 125 (5th Cir. 1974); *Marakar* v. *United States,* 370 U.S. 723 (1962).

The Government's reference in its brief to the *Petite* policy being inapplicable is inconsistent with logic and this Court's interpretation of that policy. *Rinaldi* v. *United States,* 434 U.S. 22, 24, 54 L.Ed.2d 207, 211 (1977). In a footnote (#5) to that opinion the Court stated:

> "But as the *Petite* case itself illustrates, the policy also encompasses successive federal prosecutions arising out of the same transaction. In that case, the Solicitor General represented that "it is the general policy of the Federal Government 'that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement.' The Solicitor General on behalf of the Government represents this policy as closely related to that against duplicating federal-state prosecutions, which was formally defined by the Attorney General of the United States in a memorandum to the United States Attorneys. (Department of Justice Press Release, April 6, 1959)."

See also, Department of Justice, United States Attorney's Manual §§9-2.142[1] and §§9-2.143.[2] The fact the indictments were returned at the same time makes no difference. The effect on the defendant is the same.

Wherefore, for the above stated reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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[1] §§9-2.142 of the Manual reads: "No Federal case should be tired when there has been a state prosecution for substantially the same act or acts without a recommendation having been made to the Assistant Attorney General demonstrating compelling Federal interests for such prosecution.

"No such recommendation may be approved by the Assistant Attorney General without having it first brought to the attention of the Attorney General."

[2] §§9-2.143 of the Manual reads: "When several offenses arise out of a single transaction, they should be alleged and tried together and should not be made the basis of multiple prosecutions. If a prospective defendant has been Federally prosecuted for an offense and a United States Attorney desires to further prosecute him for another offense arising from the same transaction, a recommendation for this course of action shall be submitted to the Assistant Attorney General for approval prior to initiating prosecution."

APPENDIX

APPENDIX TO REPLY

Badger Steel Erectors are alleged victims in Counts 2, 3 and 4 of indictment 76 CR 598 and Counts 1 and 2 of indictment 76 CR 602. In both indictments Robert Seeley is alleged to have received the extortionate payment. The extortion in indictment 76 CR 598 is alleged to have occurred in December, 1973 (Count 2), April, 1974 (Count 3), and March, 1975 (Count 4). The extortion in indictment 76 CR 602 is alleged to have occurred from March, 1971 to December 31, 1974 (Count 3).

David Architectural Metals, Inc. is the alleged victim in Count 10 of indictment 76 CR 598 and Counts 1 and 2 of indictment 76 CR 600. The extortion in indictment 76 CR 598 is alleged to have occurred on August 28, 1972. The extortion in indictment 76 CR 600 is alleged to have occurred from August, 1972 to March, 1974.

Hammond Fence Company is the alleged victim in Counts 12, 13 and 14 of indictment 76 CR 598 and Counts 1 and 2 of indictment 76 CR 599. The extortion in indictment 76 CR 598 is alleged to have occurred June or July, 1972, September or October, 1972, and March, 1974, respectively. The extortion in indictment 76 CR 599 is alleged to have occurred in June, 1971, and July, 1972 to November, 1972.

Integrated Building Systems, Inc. is the alleged victim in Counts 22, 23, 24 and 25 of indictment 76 CR 598 and Counts 1 and 4 of indictment 76 CR 600. The extortion in indictment 76 CR 598 is alleged to have occurred on December 6, 1973, August 9, 1974 and August 28, 1974 and June 20, 1975. The extortion in indictment 76 CR 600 is alleged to have occurred from April, 1971 until December, 1975 and from June 1, 1972 until April 1, 1973.

Ivanhoe Metal, Inc. is the alleged victim in Count 29 of indictment 76 CR 598 and Counts 1 and 5 of indictment 76 CR 600. The extortion in indictment 76 CR 598 is alleged to have occurred in October, 1973. The extortion in indictment 76 CR 600 is alleged to have occurred in April, 1971 until December, 1975 and on April 25, 1974.

Northway Construction, Inc. is the alleged victim in Counts 32, 33 and 34 of indictment 76 CR 598 and Counts 1 and 7 of indictment 76 CR 600. The extortion in indictment 76 CR 598 is alleged to have occurred on September 15, 1971, December 4, 1973 and from January 17, 1975 until August 5, 1975. The alleged extortion in indictment 76 CR 600 is alleged to have occurred from April, 1971 to December, 1975, and from February, 1973 to February, 1974.

Professional Construction Company is the alleged victim in Count 35 of indictment 76 CR 598 and Counts 1 and 3 of indictment 76 CR 599. The extortion in indictment 76 CR 598 is alleged to have occurred from April 30, 1971 to May 16, 1972. The extortion in indictment 76 CR 599 is alleged to have occurred in June, 1971 and from April, 1973 to May, 1973.

Reuben E. Smith Construction Company is the alleged victim in Counts 37 and 38 of indictment 76 CR 598 and Counts 1 and 2 of indictment 76 CR 601. The extortion in indictment 76 CR 598 is alleged to have occurred in September, 1974 and from September, 1974 to October, 1974. The extortion in indictment 76 CR 601 is alleged to have occurred in March, 1974 and from October, 1974 to February, 1975.

Star Erection Service is the alleged victim in Count 39 of indictment 76 CR 598 and Counts 1 and 8 in indictment 76 CR 600. The extortion in indictment 76 CR 598 is alleged to have occurred on May 29, 1975. The extortion in indictment 76 CR 600 is alleged to have occurred from April, 1971 to December 1975, and from April, 1974 to December, 1975.

Steel Design and Construction Erections is the alleged victim in Count 40 of indictment 76 CR 598 and Counts 1 and 2 of indictment 76 CR 600. The extortion in indictment 76 CR 598 is alleged to have occurred in May, 1971. The extortion in indictment 76 CR 600 is alleged to have occurred from April, 1971 to December, 1975 and from April, 1971 to September, 1971.

Steel Structures, Inc. is the alleged victim in Counts 41, 42, 43 and 44 of indictment 76 CR 598 and Counts 1 and 5 of indictment 76 CR 599. The extortion in indictment 76 CR 598 is alleged to have occurred on January 4, 1974, January 19, 1974, May, 1974 and February, 1975. The alleged extortion in indictment 76 CR 599 is alleged to have occurred in June, 1971 and from June, 1971 to November, 1971.